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COURT OF CRIMINAL APPEALS
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No. PD-0931-16

In the Court of Criminal Appeals of Texas
At Austin

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COURT OF CRIMINAL APPEALS
5/9/2017
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No. 01-15-00317-CR
In the Court of Appeals
For the First District of Texas
At Houston

———♦———

No. 1440970
In the 248th District Court
Of Harris County, Texas

———♦———

Andreas Marcopoulos
Appellant

v.

The State of Texas
Appellee

———♦———

State's Reply to Appellant's Brief on the Merits Filed March 14, 2017

———♦———

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Trial Judge:

Katherine Cabiness, Presiding judge, 248th District Court, Harris County, Texas

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STATEMENT OF THE CASE

Appellant was charged by indictment with possession of a controlled substance (CR 12). After a hearing on his motion to suppress, which was denied, appellant entered a plea of guilty (CR 17, 20). The trial court, pursuant to a plea bargain agreement, deferred an adjudication of guilt and placed appellant on community supervision for a period of three years (CR 33). Appellant filed timely notice of appeal, and the court certified his right to appeal (CR 31, 40).

On appeal, appellant argued that the trial court erred in not granting his motion to suppress, while the State argued that appellant had not established standing and that the search was in any event justified. On April 14, 2016, the First Court of Appeals affirmed the judgment of the trial court. *Marcopoulos v. State*, 492 S.W.3d 773 (Tex. App.—Houston [1st Dist.], pet. granted), in a divided opinion.

The majority opinion held that the warrantless search of the vehicle appellant was driving was valid pursuant to the automobile exception to the warrant requirement. *Id.,* at 778-779. The concurring

opinion held that appellant had not carried his initial burden of showing a legitimate expectation of privacy in the vehicle, and so did not reach the issue of whether the search was valid. *Id.,* at 779 (Radack, concurring,). The dissent, however, found that there was both standing to contest the search and that evidence seized from appellant's person and vehicle was not justified as either a search incident to arrest, an inventory search, or a search pursuant to the automobile exception. *Id.*, at 781-787 (Keyes, dissenting).

Appellant filed a motion for reconsideration en banc, which the court denied. Appellant then filed a petition for discretionary review, which this Court granted. Appellant filed his brief on the merits on March 14, 2017, to which this brief is in reply.

STATEMENT OF FACTS

Officer Oliver, a 12 year veteran of the Houston Police Department with six years' experience working undercover narcotics, testified at the hearing on appellant's motion to suppress (RR1 7). He explained that on September 10, 2014, he and his partner were conducting undercover surveillance of Diddy's Sports Bar (RR1 7-8). Oliver described Diddy's

as “set up like a sports bar, but they don’t sell anything other than narcotics out of there.” (RR1 8). Oliver, when asked to explain how he knew this, said that he had been doing cases at this location for six years and had personally purchased cocaine there in an undercover capacity (RR1 8). In fact, Oliver had executed a search warrant at Diddy’s just a few weeks prior, and was conducting surveillance that day to prove that cocaine was still being sold at that location to customers “who’d just in and buy” (RR1 8).

On that day, appellant pulled up in a white Chevrolet truck (RR1 9). Oliver testified that he had seen appellant at the location as a “customer” before, but had not been able to stop him in the past quick enough due to traffic or not being able to enter the bar (RR1 9). Appellant entered the bar, and exited three to five minutes later (RR1 10). In Oliver’s opinion, this was not a long enough time for appellant to have had a drink (RR1 11).

After his short stop at the bar, appellant got back into the truck and exited the parking lot (RR1 11). As Oliver followed, appellant changed lanes without signaling, which Oliver explained is an arrestable traffic offense (RR1 11). Oliver called a marked unit to assist in stopping

appellant for the traffic offense, and that unit pulled up behind appellant (RR1 16, 39).

Appellant was in the left turn lane, but did not activate the turn signal until he was already proceeding through the light, which was another traffic violation (RR1 13, 40). By this time the marked patrol unit had turned on its lights, signaling appellant to pull over (RR1 13, 41). Appellant complied by turning right into the parking lot of a gas station, once again failing to signal (RR1 13). In all, Oliver saw appellant commit three arrestable traffic offenses (RR1 13-14).

When Villa, in his marked patrol car, pulled behind appellant and signaled for him to pull over for the traffic violations, Oliver saw appellant lean over and reach toward the right passenger side of his vehicle "like a kid in trouble. Like he's trying to hide something." (RR1 12, 25). Villa testified that he too saw appellant look into the rear view mirror once the police pulled up behind him, and then make furtive gestures around the right side of the vehicle (RR1 39-40, 51-52). Appellant was still moving his hands around the center console area of his vehicle after being pulled over (RR1 41)

After appellant pulled over, Villa got out of his vehicle and approached appellant in the truck (RR1 41). Villa planned to arrest

appellant for the traffic violations he had committed (RR1 42, 43). Villa handcuffed appellant, searched him, and put all his belongings on the hood of his vehicle (RR1 42). Villa placed appellant in the back seat of his patrol car and put appellant's belongings in the front seat (RR1 42).

Villa then went to help his partner inventory the vehicle (RR1 42). Villa testified that it was his police department's policy to tow a vehicle when the driver is under arrest, and also to do an inventory search at that time (RR1 43). During the inventory, police recovered two baggies of what appeared to be a controlled substance, one in the center console of the truck and another between the center console and the passenger seat (RR1 44). The baggies field tested positive for cocaine (RR1 45). After the narcotics were found in the vehicle, Officer Villa went back to look in appellant's wallet to see if he had any other identification (RR1 45). In the wallet Officer Villa found another baggie of what field tested positive for cocaine (RR1 45).

Appellant did not testify at the hearing, and called as his only witness Mark Bennet, a defense attorney who happened to be driving by at the time appellant was being pulled over for the traffic violations. Bennet was curious to know what was happening, since he knew several lawyers who had represented individuals buying 1 to 4 grams of cocaine

at Diddy's and had handled such a case himself. (RR1 55-58). Bennet's testimony was consistent with the officers as to the timeline for appellant's arrest, and the photos he took on his phone helped illustrate the busy location where appellant was pulled over (RR1 65-69, Defendant's Exhibit No. 4-6).

The trial court, after hearing the arguments of counsel and the testimony of the witnesses, denied the motion to suppress (RR1 73). Although he made no written findings of facts or conclusions of law, he stated that he found that all of the witnesses were credible, and that "there was probable cause in this case." (RR1 73).

SUMMARY OF THE ARGUMENT

The majority opinion from the First Court of Appeals correctly held that the search of the vehicle and the subsequent recovery of cocaine was valid under the automobile exception to the search warrant requirement. Furthermore, appellant never challenged, either at trial or in the appellate court below, the recovery of cocaine found in his wallet, which was on his person at the time of his arrest, and the court of

appeals did not rule on this issue. Appellant, therefore, cannot now challenge the admissibility of this evidence in his petition.

Finally, to the extent that this Court may have granted appellant's second and third grounds for review, those grounds should be dismissed as improvidently granted, as both grounds ask this Court to rule on legal theories which were not addressed or relied upon by the court of appeals in affirming this case.

REPLY TO APPELLANT'S FIRST GROUND FOR REVIEW

The First Court of Appeals correctly held that the search of appellant's vehicle was a valid search under the automobile exception to the warrant requirement .

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. U.S. CONST. AMEND. IV; *Walter v. State*, 28 S.W.3d 538, 540 (Tex. Crim. App. 2000). Searches conducted without a warrant are normally unreasonable. *McGee v. State,* 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). However, there are several "specifically defined and well established exceptions" to this rule. *Id.*

The majority opinion for First Court of Appeals, in affirming this case, relied on one such theory — the automobile exception. Under this principle, "a warrantless search of a vehicle is reasonable if law enforcement officials have probable cause to believe that the vehicle contains contraband." *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007); *See also Keehn v. State*, 279 S.W.3d 330, 335 (Tex. Crim. App. 2009) ("Under the automobile exception, law enforcement officials may conduct a warrantless search of a vehicle if it is readily mobile and there is probable cause to believe that it contains contraband.") .

Probable cause to search exists when the totality of the circumstances leads to the conclusion that there is a "fair probability" of finding contraband or evidence at the location being searched. *Dixon v. State*, 206 S.W.3d 613, 616 (Tex. Crim. App. 2006). The training, knowledge, and experience of law enforcement officers is taken into consideration when considering the totality of the circumstances, but the subjective intent or motivations of law enforcement officials is not. *Wiede*, 214 S.W.3d at 25. A totality of circumstances approach to probable cause requires a synthesis of all relevant factors; it would be error for a reviewing court to break down the circumstances into parts and then find each part insufficient by itself to establish probable cause.

Wiede, 221 S.W.3d at 25 (holding "piecemeal" or "divide and conquer" approach is inappropriate for reviewing totality of the circumstances supporting probable cause to search an automobile).

Wiede is a good example of how a trial court might use a synthesis of factors to find probable cause to search under the automobile exception. In *Wiede*, the defendant had been involved in an automobile accident. *Id.,* at 19. A witness to the accident stopped to see if the defendant was all right. *Id.* at 20. He found him in his vehicle, injured and looking "dazed." *Id.* After the police arrived, the witness observed the defendant reach across his body and then put something which looked like a clear plastic bag between the driver's seat and console. *Id.* He told the police about his observation, and the police then searched the defendant's car and recovered a plastic bag containing a "whitish" substance which was later determined to be methamphetamine. *Id.,* at 21.

The trial court denied appellant's motion to suppress, noting that he believed the circumstances established probable cause to search the vehicle. *Id*. The Third Court of Appeals reversed this ruling, after discussing and then discounting each factor individually. *Id*., 23. This Court, in reversing the judgement of the court of appeals and reinstating

the trial court's ruling on the motion to suppress, found that the lower appellate court "did not afford almost total deference, as required, to the trial judge's implicit fact-findings that demonstrate the presence of probable cause." *Wiede*, 214 S.W.3d at 25.

The majority's opinion in the instant case applies the same deference to the trial court's denial of appellant's motion to suppress as this Court required in *Wiede*. It also looks at a synthesis of the totality of the circumstances, instead of the "piecemeal" approach appellant urges this Court to take.

For example, appellant argues that "furtive gestures alone are insufficient probable cause." (Appellant's brief on the merits, p. 15). The State agrees, but that is not the situation in this case. Instead, the trial court and the court of appeals considered a combination of furtive gestures and other suspicious circumstances to find probable cause under a totality-of-the-circumstances analysis. *See Wiede*, 214 S.W.3d at 25–28; *Smith v. State*, 542 S.W.2d 420, 421(Tex. Crim. App. 1976) ("[f]urtive movements are valid indicia of mens rea and, when coupled with reliable information or other suspicious circumstances relating the suspect to the evidence of crime, may constitute probable cause.").

Here, the trial court was presented with evidence that Officer Oliver, an experienced narcotics officer, had been investigating controlled substances buys at Diddy's Sports Bar for six years. (RR1 8). His testimony indicated that he had personally purchased cocaine at the location as recently as a few weeks ago, and was familiar with the patterns of customers who would quickly enter and exit the bar just to buy narcotics at the location (RR1 8). When appellant pulled up, Oliver recognized him as "another customer we've seen at the location before"[1] and noted that his behavior was "just like our past cases we investigated there" when he pulled into the parking lot, entered the sports bar, and exited three to five minutes later (RR1 10). Oliver testified that in his opinion this would not have been enough time to have had a drink at the bar (RR1 11). When a marked patrol vehicle subsequently pulled behind appellant and signaled for him to pull over for a traffic violation, Oliver, who was driving in an unmarked car right beside appellant, saw him lean over and reach toward the right passenger side of his vehicle (RR1

[1] Appellant insists the evidence showed he had only been to Diddy's once before, but the trial court could have understood Oliver's testimony to mean that appellant had been there multiple times, exhibiting behavior similar to that on the day of his arrest. ("We'd seen him at the location before, we couldn't get him to stop quick enough and get him out of there due to traffic or we couldn't enter in there. At this time when we seen him come back which we did, it was another customer we've seen at the location before." (RR1 9)).

23, 25). Villa testified that he too saw appellant look into the rear view mirror once the police pulled up behind him in a marked unit, and then make furtive gestures around the right side of the vehicle (RR1 39-40, 51-52). Appellant was still moving his hands around the center console area of his vehicle once he was pulled over (RR1 41).

These facts are sufficient, in combination, to support the trial court's determination that the officers had a "fair probability" of finding contraband or evidence in the vehicle. *See Wiede*, at n. 29; *Marcopoulos*, at 778 ("Given Appellant's repeated history of going to a place [ ] known for selling narcotics, his uncommonly short time spent at a bar, and his furtive gestures when he noticed a patrol car behind him, we hold there was a substantial basis in the record to support the trial court's ruling of probable cause.").

Appellant criticizes the majority opinion for failing to distinguish *Canales v. State*, 221 S.W.3d 194 (Tex. App. –Houston [1st Dist.] 2006, no pet.) and *State v. Bowman*, No. 02-09-2010 WL 2813504 (Tex. App.—Fort Worth 2010, pet. dism'd)(not designated for publication) (appellant's petition, p. 11). While the First Court of Appeals is not obligated to distinguish every case that is inapposite (particularly an unpublished opinion from a different court of appeals), the State is

happy to do so for these two cases, as they illustrate two important reasons why this Court should affirm the opinion below.

In *Canales*, Officer Cayton approached two people sitting in a convenience store parking lot in a high crime area. As he was approaching the car, Cayton saw pieces of cigar outside the driver's window, on the window, and on appellant, the driver. Cayton testified that he knew people often used such cigars to empty out and fill with marijuana. *Id.* However, it was a different officer, Officer Teweleit, who saw appellant reach for something, ordered him out of the vehicle, and searched the vehicle. *Id.* The Court found that there was no evidence that Teweleit, who was standing on the other side of the vehicle, saw the same suspicious circumstances as Cayton, and thus held that Teweleit did not have probable cause to search appellant's vehicle *solely on appellant's furtive gesture alone.*

> Teweleit did not testify at the motion to suppress hearing and there is no evidence that he saw "the pile of [ ] pieces of cigar" that Cayton saw on the driver's side of the car. There is also no evidence that Teweleit, like Cayton, would have suspected the presence of narcotics based on the presence of cigar pieces and the totality of the circumstances. Moreover, we note that Cayton, who was clearly aware of the cigar pieces, did not order appellant out of the car and, at the time, Cayton had no idea why Teweleit had ordered appellant out of the car. Instead, the record indicates that *Teweleit … searched the car based solely on his observation*

> *that appellant put his right hand between the car's seat and console*. Accordingly, we hold that the evidence presented at the motion to suppress hearing did not establish that Officer Teweleit had probable cause to believe that appellant's car contained contraband or evidence of a crime.

Canales v. State, 221 S.W.3d at 201 (emphasis added).

Again, the case at hand involved more than a mere furtive gesture. Villa testified that he and his partner were working with narcotics Officer Oliver, who informed them of appellant's behavior at Diddy's and his belief that appellant had just purchased narcotics at the location (RR1 39). While appellant committed several traffic violations, which led to his initial arrest, it was this information, in addition to the furtive gestures appellant made, which gave the police probable cause to search his vehicle, and which makes *Canales* inapplicable.

Bowman, on the other hand, is a State's appeal of the trial court's decision to grant the defendant's motion to suppress. In *Bowman*, the police testified that they had received information from a confidential informant that the defendant was a methamphetamine dealer, and would be meeting in a grocery store parking lot with his supplier at a specified time to receive a supply of the drug. *Id*., at *1. The police set up surveillance and observed the defendant arrive at the grocery store, walk over to a vehicle, and return with a black plastic bag. *Id.* They

subsequently pulled the defendant over for a traffic violation, searched him incident to arrest, and recovered a black plastic bag in his vehicle, which was found to contain methamphetamine. *Id.*

The Second Court of Appeals stated that "*although [this] testimony clearly constitutes probable cause if believed,* there are suggestions in the record that the trial court questioned whether [the defendant] actually committed traffic violations and whether there was independent probable cause to search [his] car."). *Id*., at *3 (emphasis added). Specifically, based on the trial court's statements, the appellate court in *Boswell* assumed that the trial court disbelieved that that there was any confidential informant at all. *Id.*, at *3. The only evidence then left was that the defendant received a black plastic bag from someone in a grocery store parking lot, which, by itself, was insufficient to establish probable cause. *Id.* Because the trial court appeared to disbelieve the majority of the police officers' testimony, and after noting its duty to "defer to the trial court's determinations of credibility and demeanor, and … view the evidence in the light most favorable to the trial court's ruling by giving it almost total deference," the Second Court of Appeals upheld the trial court's granting of the defendant's motion to suppress.

Bowman is instructive for illustrating the deference which must be given to a trial court's ruling on a motion to suppress. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007) (holding that a reviewing court must give almost total deference to a trial court's determination of historical facts that the record supports, especially when the trial court's findings are based on an evaluation of credibility and demeanor). As such, *Bowman* supports rather than negates the First Court of Appeals' opinion upholding the trial court's ruling on this motion to suppress.

Appellant also argues that the cases relied upon by the majority are not relevant because they do not involve similar fact situations (appellant's petition, p. 14-15). In addition, he chastises the majority for not discussing or distinguishing several other unpublished cases from the First Court of Appeals (appellant's petition, pp. 13-14). *See, e.g., Hayward v. State*, No. 01-08-00949-CR, 2009 WL 1813185 *3-4(Tex. App. – Houston [14th Dist.] 2009, pet. dism'd) (not designated for publication); *Lee v. State*, No. 01-95-01084-CR *2, 1996 WL 227391 (Tex. App.-Houston [1st Dist.] 1996, pet. ref'd) (not designated for publication); *Leach v. State*, No. 01-94-00836-CR, 1996 WL 38065 *6

(Tex. App.-Houston [1st Dist.] 1996, pet. ref'd) (not designated for publication). Aside from the lack of precedential value of unpublished opinions (*See* TEX. R. APP. P. 47.7),[2] there was no need for the court to distinguish these cases, *as every single one found sufficient circumstances to justify probable cause to search the vehicle in question.* Naturally every case is fact specific, some providing information from informants, some from individuals, and some from the officer's own observations, but none are so different as to require a dissimilar result. Furthermore, they are all instructive as to the standards to be used in determining whether there is a fair probability that contraband will be found in the vehicle in question and the deference to be given to the trial court's ruling.

Probable cause requires an evaluation of probabilities, and probabilities "are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Wiede*, 214 S.W.3d at 17 (citing *Brinegar v. United States*, 338, U.S. 160, 175 (1949)). The First Court of Appeals, using this common sense standard and giving the trial court's ruling the proper deference it deserved, correctly upheld the trial court's denial of appellant's motion

[2] Appellant fails to cite these cases with the notation "(not designated for publication)," as required by TEX. R. APP. P. 47.7(a).

to suppress by finding a valid automobile exception to the search warrant requirement. The judgment of the First Court of Appeals should be affirmed.

———————————♦———————————

REPLY TO APPELLANT'S SECOND AND THIRD GROUNDS FOR REVIEW

Appellant's second and third grounds for review should be dismissed as improvidently granted, since the First Court of Appeals did not consider and did not uphold the search of appellant's vehicle as either a search incident to arrest or as a proper inventory search, and was never presented with the issue of whether the cocaine found in appellant's wallet should have been suppressed.

This Court granted appellant's petition for discretionary review, but did not specify on which grounds it was granted. Appellant's first ground for review challenges the basis for the First Court of Appeals' decision upholding the trial court's ruling on the motion to suppress below, namely that there was a valid search under the automobile exception to the search warrant requirement. The State believes it has replied to this first ground thoroughly above, and that the lower court's opinion should be affirmed.

Appellant, however, raises two additional grounds for review which were not discussed by the majority opinion and did not form any basis for the lower court's affirmance of this case. Those grounds, if included in this Court's general grant of discretionary review, should be dismissed as improvidently granted.

Appellant asks this Court in these two grounds to determine whether there was probable cause to search appellant's vehicle incident to arrest and whether the search of appellant's vehicle can be upheld as a proper inventory search (appellant's petition, p. 3). The majority opinion, after noting these two arguments, very clearly stated that *"[w]e do not need to reach the substance of any of these issues*… because we hold that the officers' search of his truck was valid pursuant to the automobile exception to a search warrant." *Marcopoulos*, at 777 (emphasis added).

This Court has noted in the past that its jurisdiction is limited to review of decisions by the courts of appeals. TEX. R. APP. P. 66; *State v. Consaul*, 982 S.W.2d 899, 902 (Tex. Crim. App. 1998) (Price, concurring) As a result, this Court does not address issues that were not addressed by the lower appellate court. *Id.* ("As we have repeatedly stated, 'This court reviews only "decisions" of the courts of appeals; we do not reach

the merits of any party's contention when it has not been addressed by the lower appellate court.'"(citing *Sotelo v. State,* 913 S.W.2d 507, 509 (Tex. Crim. App. 1995)); *See also Fox v. State*, 930 S.W.2d 607, 607 (Tex. Crim. App. 1996). ("As a general rule, we do not reach the merits on any party's contention when it has not been addressed by the lower appellate court.").

Appellant, in fact, fails to mention, much less challenge, any ruling from the majority opinion on these two grounds. The concurring opinion in this case found that appellant failed to establish standing, and thus did not reach the issue of whether the search was valid on any grounds. *Marcopoulos*, at 778 (Radack, concurring). The dissent, since it rejected the argument that this was a proper search pursuant to the automobile exception, continued in its analysis and also rejected the possibility that the search was justified as an inventory search or a search incident to arrest. *Id*. at pp. 5-13(Keyes, dissenting). It is this dissenting opinion that appellant repeatedly references in his final two grounds for review; he mentions the majority opinion not once. The dissenting opinion, however, is not the judgement of the court (hence the designation "dissent") and matters discussed solely by the dissent do not constitute the ruling of the court. *See, e.g., State v. Do*e, 61 S.W.3d

99, 110 (Tex. App.—Dallas 2001, *aff'd* 112 S.W.3d 532 (Tex. Crim. App. 2003)(noting that dissents have no precedential value). Thus, if this Court finds that the majority erred in affirming this case on the theory that the search was proper under the automobile exception, the correct action would be to remand the case to the court of appeals for further proceedings not inconsistent with this Court's opinion.) *cf. Dansby v. State*, 398 S.W.3d 233, 242 (Tex. Crim. App. 2013) (reversing and remanding to court of appeals for further appellate consideration of constitutional issues not addressed on direct appeal). Appellant's last two grounds, asking the court to "review" holdings which the court never made, should accordingly be dismissed as improvidently granted.

Finally, the State would like to point out that appellant never challenged the admissibility of the cocaine found in his wallet at the motion to suppress hearing or on appeal. Instead, appellant only asked the trial court "to find they had lack of probable cause to enter the vehicle, search the vehicle as they did."(RR1-71). The State noted below that appellant waived any issue regarding the legality of the search of his wallet at trial and on appeal (*See* TEX. R. APP. P. 33.1(a)(1)(A)) and appellant has never contested this fact.

Consequently the Court of Appeals did not discuss the legality of the search of appellant's wallet, which was on his person at the time of his arrest. Appellant also never mentioned the search of his wallet in his petition for discretionary review. In appellant's brief on the merits, however, appellant suddenly started referring to the warrantless search of his "truck and wallet," using the term over a dozen times. (appellant's brief on the merits, pp. 8-27). Appellant even implies that the courts below ruled on this matter. For example, appellant states in his brief to this Court that "[t]he court of appeals' majority opinion … held that the search of his truck *and wallet* were valid pursuant to the automobile exception to the warrant requirement." (appellant's brief on the merits, p. 8-9).

This statement is simply untrue. Instead, the court of appeals correctly noted that appellant was challenging the trial court's ruling "denying his motion to suppress evidence obtained *from searching the truck*." (*Marcopoulos*, at 776) (emphasis added). The wallet was not part of this evidence, as it was not recovered from the vehicle, but rather was on appellant's person at the time of his arrest.

Once again, appellant is attempting to have this Court review an issue which was not preserved in the trial court below and was not

ruled on by the court of appeals. Thus, in the event this Court's granting of appellant's petition for discretionary review included the granting of these two final grounds for review or the admissibility of the cocaine found in appellant's wallet, they should be dismissed as improvidently granted.

Conclusion

The State asks this Court to dismiss appellants second and third grounds for review as improvidently granted, and to affirm the opinion of the First Court of Appeals.

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